No. 18760

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNION PACIFIC RAILROAD COMPANY,

Appellant,

vs.

JUAN MUNOZ and MARIA MUNOZ,

Appellees.

On Appeal From the United States District Court for the Southern District of California, Central Division.

BRIEF FOR APPELLANT.

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BRIEF FOR APPELLANT.

I.

JURISDICTIONAL STATEMENT.

This is an appeal from a final judgment entered in favor of plaintiff, Juan Munoz, in the United States District Court, Southern District of California, Central Division, on March 25, 1963. The underlying action was brought by plaintiff, Juan Munoz, seeking damages for personal injuries suffered when he was struck by one of defendant's trains on the premises of his employer, Continental Can Company. The District Court's jurisdiction was invoked under 28 U. S. C. 1332(a)(1), the plaintiff being a resident of the State of California and the defendant being a corporation of the State of Utah, and the amount sued for exceeding $10,000.00.

The trial resulted in a verdict for plaintiff in the amount of $300,000.00. Defendant's motion for judgment after trial or in the alternative for a new trial, was denied by the trial judge on April 8, 1963. Defendant filed a timely Notice of Appeal on May 3, 1963. This court's jurisdiction rests upon 28 U. S. C. 1291.

II.

STATEMENT OF THE CASE.

This is an action for personal injuries brought by plaintiff, a resident of the State of California, against defendant railroad company, a corporation of the State of Utah, under the diversity provisions of 28 U. S. C. 1332(a)(1).

A. Factual Background.

The accident occurred at approximately 7:30 P.M. on December 7, 1961. One of defendant's switch engines proceeded into the premises of Continental Can Company in the City of Los Angeles for the purpose of picking up loaded gondola freight cars and spotting unloaded gondola cars. The first part of the operation was performed without incident as the engine coupled onto the loaded cars, pulled them out of the Continental premises, and placed them on the industrial spur track lead. The accident occurred as the switch engine returned into the Continental premises pushing four empty gondola cars ahead of the switch engine. The track on which the accident occurred runs alongside a loading platform approximately 324 feet in length. At the northerly end of the platform there is a large electric door enclosing the entrance of the tracks into a building. When the door is raised the railroad cars may be moved in or out of the building.

Plaintiff was employed in the shipping department of the Continental Company. On the night in question he went to dinner at 7:30 P.M. He walked out of the building in which he was working onto the loading dock next to the tracks, walked across the dock to a ladder, descended the ladder and was starting to walk across the tracks when struck by the leading gondola car, thereby incurring the injuries which formed the basis of his case against defendant.

B. Legal Background—Last Clear Chance.

The sole question involved in this appeal is whether or not the jury should have been instructed on the doctrine of last clear chance.

The last clear chance doctrine relieves an injured party of the results of his own contributory negligence and permits him to recover, despite such negligence, under certain specific circumstances. It is characterized as a "humanitarian" doctrine, which places its emphasis upon the time sequence of events and holds the defendant liable if immediately prior to the harm he has the superior opportunity to avoid it.

The legal principles governing this doctrine in California have been clearly enunciated by the appellate state courts. The leading case in California was decided in 1957 by the Supreme Court and laid down the basic formula for the application of the doctrine of last clear chance in the following language:

> "The doctrine of last clear chance may be invoked if, and only if, the trier of the facts finds from the evidence: (1) that the plaintiff was in a position of danger and, by his own negligence, became unable to escape from such position by the

use of ordinary care, either because it became physically impossible for him to escape or because he was totally unaware of the danger; (2) that defendant knew that plaintiff was in a position of danger and further knew, or in the exercise of ordinary care should have known, that plaintiff was unable to escape therefrom; and (3) that thereafter defendant had the last clear chance to avoid the accident by the exercise of ordinary care but failed to exercise such last clear chance, and the accident occurred as a proximate result of such failure."

Brandelius v. City & County of S.F. (1957), 47 Cal. 2d 729; 306 P. 2d 432.

It is error for the trial court to instruct the jury concerning the doctrine in the absence of substantial evidence, conflicting or otherwise, to support each of the three specified elements.

Doran v. City & County of S.F. (1955), 44 Cal. 477; 283 P. 2d 1.

The question of whether there is any substantial evidence to support each of the three elements is a question of law.

Doran v. City and County of San Francisco, supra.

If there is such substantial evidence to support each of the three elements, the question of whether the defendant should be held to have had a last clear chance to avoid the accident is a question of fact to be determined by the jury under appropriate instructions.

Doran v. City and County of San Francisco, supra.

In determining on appeal whether an instruction on the doctrine should have been given, the evidence is viewed most favorably to the contention that the doctrine is applicable.

Warren v. Ubungen (1960), 177 Cal. App. 2d 605; 2 Cal. Rptr. 411.

The principles set forth above establish the framework of law within which this court should consider the present appeal. Appellant will discuss each of these principles in greater detail as applied to the facts in this case in the Argument section of this brief.

C. Facts Relating to Last Clear Chance.

The witnesses who are best able to testify concerning the events immediately preceding the accident are William Malone, the engineer who was operating the switch engine, the engine foreman Jack Baker, one of the switchmen, James Trembley, and the plaintiff himself, Juan Munoz. None of the other witnesses who testified at time of trial were actual eye witnesses to the accident, although Shirley Lawton was present in the accident area.

The plaintiff's testimony was that he was relieved to go to supper at about 7:30 P.M. [R. T. 224], walked out of the building in which he was working onto the dock and across the dock to the top of the ladder. [R. T. 225.] At this time he looked to his left and saw the train 100-150 feet away standing still. [R. T. 226.] While looking at the train, he saw a man get off the end of the closest railroad car and stand down on the ground. [R. T. 227.] He then looked to his right and saw a man standing four or five feet away with a lantern in his hand

with whom he had a brief conversation concerning the weather. [R. T. 228.] He marked on Defendant's Exhibits F and J the spot where this man was standing at the time. [R. T. 254 and 255.] He then looked at the train again and the train had not moved and was still 100-150 feet away. [R. T. 229 and 258.] Plaintiff was shown the photograph, Defendant's Exhibit I, and testified that he went down the ladder in the same way that the man is shown going down the ladder in the photograph. [R. T. 229.] When he got to the ground he turned his head to the right and saw the train standing still, in the same position that it had been in when he looked previously while at the top of the ladder, and still 100-150 feet away. [R. T. 231, 259 and 260.] After looking at the train, he turned his body around toward the left so that he was facing toward the tracks. [R. T. 231, 261 and 262.] After turning around, but before walking forward, he looked at the train again [R. T. 264 and 265], and it was still 100-150 feet away, in the same place. [R. T. 266.] Before starting to walk across the tracks he was standing within one foot of the ladder. [R. T. 268.] He waited one or two seconds before starting to walk forward across the tracks [R. T. 264] at a normal, regular speed. [R. T. 265.] He took two or three steps forward and heard the man on his right, with whom he had had the conversation about the weather, yell "Go, Go". [R. T. 231 and 263.] He turned to look at the man who was yelling, took one more step and the train hit him on the hip and knocked him down. [R. T. 232 and 263.] The train ran over both of his legs. [R. T. 232, 233.] He did not see the train at all when it was moving. [R. T. 269.]

The engineer, William Malone, testified that he was operating the switch engine at the time of the accident, sitting on the right side of the engine. [R. T. 438.] The engine was pushing four gondolas [R. T. 439], with its headlight burning in the dim position. [R. T. 440.] The train was traveling approximately four miles per hour [R. T. 441], and did not change speed after entering the Continental Can premises until the brakes were applied just before the accident. [R. T. 442.] He was following lantern signals given by engine foreman Baker, who was down by the electric door. [R. T. 443.] He first saw the plaintiff when the plaintiff was up on the loading platform approximately eight feet from the edge of the ramp and walking toward the edge of the ramp. [R. T. 444 and 445.] Plaintiff was approximately ten feet south of the ladder when at the edge of the platform. [R. T. 495 and 497.] He testified that the plaintiff "put one hand down on the ramp, on the cement and stepped off of the platform". [R. T. 445.] He states that the plaintiff went out of sight after he stepped off the platform and that he stopped the train immediately. [R. T. 445.] He stated that he got a violent stop signal from engine foreman Baker just at the time the plaintiff started to step off the platform. [R. T. 444, 445 and 446.] He estimated that the leading edge of the train was eight or ten feet from the ladder at the time he saw the plaintiff for the first time, and was approximately eight feet from the ladder when he saw the plaintiff step off the platform. [R. T. 446.] He stated that when he first saw the plaintiff he had no reason to believe plaintiff would attempt to cross the tracks in front of the train [R. T. 448], that he had no idea that

Mr. Munoz would go forward, and he really fully expected him to stop. [R. T. 526.] He estimated that the train traveled approximately five or six feet after the brakes were applied. [R. T. 447.] He stated that on other occasions prior to the accident he had seen Continental Can employees wait on the dock for the train to go by. [R. T. 456.]

James Trembley testified that he was a switchman riding on the front edge of the front car as the train entered the Continental Can premises [R. T. 679], but that he got down to the ground at a point about 300 feet from the electric door [R. T. 680] and remained standing at that point, between the train and the dock. [R. T. 681.] He estimated the speed of the train at three or four miles per hour. [R. T. 681.] He stated that he saw the plaintiff step off the dock in front of the train at a time when the front end of the train was 10 or 15 feet from the ladder. [R. T. 683, 695.] He states that the plaintiff was facing away from the dock and toward the train when he stepped off [R. T. 683] and that plaintiff may have touched one of the steps of the ladder with the back of his heel as he descended. [R. T. 683.] He did not see the plaintiff at any time up on the platform. [R. T. 684.] He states that engine foreman Baker was standing 15 to 20 feet inside the electric door before the accident [R. T. 681] and that at the time the plaintiff stepped off of the platform he observed Mr. Baker give a violent stop sign signal. [R. T. 685.] He also heard Mr. Baker yelling at the same time. [R. T. 685.] At the time the accident occurred, the engine had already passed by him [R. T. 703] and the engineer could not see him, therefore. [R. T. 704.]

The testimony of Jack Baker was that he was the engine foreman on the switch crew on the night of the accident [R. T. 741] and that he remained at the area of the electric door when the switch engine pulled out of the Continental Can premises with the loaded cars. [R. T. 741.] As the switch engine returned into the Continental premises pushing the empty gondola cars, he was standing just outside of the electric door. [R. T. 743.] As the train proceeded toward him, he walked backwards inside the building. [R. T. 743.] The accident occurred between 7:00 and 7:30 and the lighting conditions were dark [R. T. 744], although there were electric lights located overhead on the dock. [R. T. 744.] He observed switchman Trembley riding on the lead car carrying a white lantern and then get off of the train and lean up against the dock. [R. T. 744, 745.] He was approximately 60 feet inside the electric doors, standing on the ground when he first saw the plaintiff, Juan Munoz. [R. T. 746.] He saw plaintiff one step before he reached the edge of the platform; that plaintiff took one step, and then one step down and he was on the ground. [R. T. 747.] The plaintiff came down the steps in a hurried manner. [R. T. 747.] He saw plaintiff take just one step on the platform and plaintiff was moving fast. [R. T. 770.] Plaintiff did not say anything to him before descending the ladder. [R. T. 747.] Plaintiff did not stop at the top of the ladder for any observable period of time. [R. T. 747.] The plaintiff did not look toward the train while standing at the top of the ladder. While plaintiff was coming down the steps, Baker gave a violent stop sign with his lantern and started hollering "No, No." [R. T. 753.] Baker then stated that the plaintiff had "just

III.

SPECIFICATION OF ERRORS RELIED UPON.

1. The District Court erred in giving Plaintiff's Requested Instruction No. 37 on the doctrine of last clear chance as follows:

> "A certain reasoning process that we sometimes call to our aid in analyzing the facts of an accident case is known as the Doctrine of Last Clear Chance. It is permissible to use the doctrine only after we first find, and you may not use it unless and until you first shall have found, that in the events leading up to the accident in question both the plaintiff and defendant were negligent.
>
> "The Doctrine of Last Clear Chance may be invoked if, and only if, you find from the evidence:
>
> "First: That the plaintiff was in a position of danger and, by his own negligence became unable to escape from such position by the use of ordinary care, either because it became physically impossible for him to escape or because he was totally unaware of the danger;
>
> "Second: That defendant knew that plaintiff was in a position of danger and further knew, or in the exercise of ordinary care should have known, that plaintiff was unable to escape therefrom;
>
> "Third: That thereafter defendant had the last clear chance to avoid the accident by the exercise of ordinary care but failed to exercise such last clear chance, and the accident occurred as a proximate result of such failure.
>
> "If all the conditions just mentioned are found by you to have existed with respect to the accident

in question, then you must find against the defense of contributory negligence, because under such conditions the law holds the defendant liable for any injury suffered by the plaintiff and proximately resulting from the accident, despite the negligence of the plaintiff."

Trial counsel discussed the appropriateness of the last clear chance instruction in Chambers with the trial judge. [R. T. 884, lines 8-14.] After conferring in Chambers the court requested trial counsel to discuss the instruction on the record. Counsel for defendant objected to the giving of the last clear chance instruction on the ground there was not substantial evidence to support each of the required elements of the doctrine of last clear chance. [R. T. 893-899; 905-908.] Counsel for defendant formally objected to the giving of the instruction, both at the time that counsel discussed it in the absence of the jury with the trial judge [R. T. 908, lines 18-19] and immediately prior to the time the jury retired to commence deliberations. [R. T. 1018, line 19, to 1019, line 14.] The objection made at the latter time was based upon the lack of substantial evidence to support each of the necessary elements of the doctrine of last clear chance and upon the written Memorandum of Points and Authorities regarding last clear chance which had been filed with the trial court the previous day. [R. T. 52.]

IV.

QUESTIONS PRESENTED.

1. Whether or not the trial judge committed prejudicial error in giving the last clear chance instruction to the jury.

V.

ARGUMENT.

GIVING THE LAST CLEAR CHANCE INSTRUCTION IN THIS CASE WAS PREJUDICIAL ERROR ENTITLING DEFENDANT TO A NEW TRIAL.

A. Summary of Argument.

There must be "substantial evidence" to support a favorable finding on each of the three required elements of the last clear chance formula. Evidence may not be considered as "substantial" for this purpose unless it is reasonable, credible, and of solid value. In the absence of such evidence on even one element of the formula the doctrine does not apply and it is prejudicial error for the trial court to instruct the jury on the doctrine.

Appellant concedes that there is substantial evidence to support the first two elements of the doctrine, but contends that on the third, and crucial element, there is a fatal defect of substantial evidence. In this case, plaintiff was not in a position of danger until he stepped forward from his position of safety at the bottom of the ladder on to the railroad tracks. Since defendant's employees had already applied the train's brakes before the plaintiff stepped forward on to the tracks without avoiding the accident, it was impossible for defendant to have a last clear chance to avoid the accident in the exercise of ordinary care.

The all important time-interval was not present. A period of time for the defendant to act in exercising its last and clear chance which involves only a few seconds, or requires a splitting of seconds, is not sufficient to bring the last clear chance doctrine into operation.

Accordingly, the trial court erred in instructing the jury on the doctrine of last clear chance and defendant is therefore entitled to a new trial.

B. There Was Not Substantial Evidence to Support the Three Elements of the Last Clear Chance Doctrine.

There must be "substantial evidence" to support a favorable finding on each of the required elements of the doctrine of last clear chance and if any one of these elements is absent, the doctrine does not apply, the case is governed by the ordinary rules of negligence and contributory negligence, and it is error for the trial court to instruct the jury concerning the doctrine of last clear chance.

> *Doran v. City and County of San Francisco, supra, etc.*

Several decisions of California Appellate courts have considered the meaning of the word "substantial" when used as a limiting adjective in the phrase "substantial evidence." In the *Doran* case, *supra,* the court's opinion refers to the testimony of plaintiffs "that the bus was still at the corner (about 120 feet away) and was just starting to move at the time that plaintiffs crossed the street, is inherently improbable as it cannot be reconciled with the happening of the accident. Such testimony therefore cannot be deemed to be substantial evidence on that subject." The remarkable similarity between the plaintiffs' testimony in the *Doran* case and the plaintiff's testimony in this case cannot be denied. Mr. Munoz's testimony that he looked at the train four separate times and on each occasion it was standing still 100-150 feet away, but

that the train hit him after he took only two or three steps forward is likewise "inherently improbable" and cannot be deemed to be "substantial evidence" following the reasoning of the court in the *Doran* case.

The District Courts of Appeal have lent meaning to the phrase "substantial evidence" in several cases. In a 1960 case involving a collision between a minor riding a bicycle and an automobile, the defendant driver of the automobile testified at time of trial that only a few seconds elapsed between the time she saw the child and the full stop of her automobile. In her deposition she had previously testified she thought the interval of time was about thirty seconds. The trial court refused an instruction on last clear chance and the plaintiff appealed, contending that because of the 30-second deposition testimony of defendant it was clear that defendant had indeed had a last clear chance to avoid the accident. The District Court of Appeal affirmed the judgment below for defendant and in reviewing the testimony stated:

> ". . . a realistic view of the situation indicates only several seconds could have elapsed as respondent stated at trial. The rule requiring the evidence to be viewed in favor of the doctrine does not require reality to be ignored, since there is the substantiality requirement. * * * under the most favorable realistic view of the evidence only a few seconds elapsed between respondent seeing the child and impact."
>
> *Fambrini v. Stikkers* (1960), 183 Cal. App. 2d 235, 240, 244, 6 Cal. Rptr. 833.

Thus, it appears that in order for evidence to be the "substantial evidence" required for each of the neces-

sary elements before the instruction may be given, the evidence must be "realistic". It is obvious that the court in that case did not consider that "any" evidence should be considered as "substantial" evidence, but that the evidence must be "realistic" in order to be so considered.

A different District Court of Appeal came to a similar conclusion some months later in considering the case of *Todd v. Southern Pacific Company.* In that case the plaintiff's automobile appeared from behind a stationary box car when about thirty feet from the point of impact. The fireman on defendant's engine immediately yelled a warning to the engineer, who applied the brakes, but the collision occurred. The trial court refused to give the last clear chance instruction and a judgment for defendant railroad resulted. On appeal, plaintiff's argument that the last clear chance doctrine was applicable rested upon mathematical calculations which were in turn based upon estimates of speed and distance by various witnesses. Plaintiff also contended that the testimony of defendant's witnesses was not credible and that this lack of credibility should give rise to application of the last clear chance doctrine. The appellate court disposed of these two claims in the following language:

> "The case is one peculiarly appropriate for application of the principle that 'mere doubt as to the credibility of defendant or the accuracy of his estimate of distance would not amount to affirmative evidence of any material fact'. (citations omitted). Mathematical calculations, when based upon reasonably precise data, are most helpful to a court or jury, but when they are based upon

the vague type of assumptions that appellant is compelled to make here, they are dangerously deceptive. To hold that in this case a jury could find that the defendants had a 'last clear chance' to avoid the accident would be to read into those simple words a meaning that they do not have and were never intended to have."

Todd v. Southern Pacific Company (1960), 184 Cal. App. 2d 376, 384; 7 Cal. Rptr. 448.

The *Todd* case stands for the proposition that failure to believe direct testimony cannot be considered as the equivalent of "substantial evidence" of any fact in opposition to the direct testimony. The case also sounds a note of caution in dealing with mathematical calculations as evidence which must meet the test of "substantial evidence".

Still another District Court of Appeal, in attempting to explain the phrase "substantial evidence" turned to dictionary definitions in the following language:

"There must be substantial evidence present to justify the question of last clear chance going to a jury, and the existence of substantial evidence justifying the application of the doctrine is a question of law. (*Doran v. City & County of San Francisco,* 44 Cal. 2d 477 (283 P. 2d 1); *Nippold v. Romero,* 145 Cal. App. 2d 235 (302 P. 2d 367).) In *Estate of Teed,* 112 Cal. App. 2d 638, 644 (247 P. 2d 54) the court said with reference to substantial evidence as follows:

" 'Webster's International Dictionary defines the word as follows: "Consisting of, pertaining to, of the nature of or being, substance,

existing as a substance; material." Its meaning is further defined as "not seeming or imaginary, not illusive, real, true; important, essential, material, having good substance; strong, stout, solid, firm." The word means "considerable in amount, value or the like; firmly established, solidly based." Synonyms are "tangible, bodily, corporeal, actual, sturdy, stable."

" 'Substantial evidence," according to Words and Phrases, Fifth Series, page 564, . . . is evidence "which, if true, has probative force on the issues." It is more than "a mere scintilla," and the term means "such relevant evidence as a reasonable man might accept as adequate to support a conclusion." . . . *"improbable conclusions* drawn in favor of a party litigant through the sanction of a jury's verdict *will not be sustained where testimony is at variance with physical facts and repugnance is material and self-evident.*" (Emphasis added.)

" 'The sum total of the above definitions is that, if the word "substantial" means anything at all, it clearly implies that *such evidence must be of ponderable legal significance.* Obviously the word cannot be deemed synonymous with "any" evidence. *It must be reasonable in nature, credible, and of solid value; it must actually be "substantial" proof of the essentials which the law requires in a particular case.'* (Emphasis added.)"

Dyer v. Knue (1960), 186 Cal. App. 2d 348; 8 Cal. Rptr. 753.

Thus, we see that "substantial evidence" must be more than just "any" evidence and must have substance, reasonable, credible, and of solid value.

In the 1961 case of *Di Sandro v. Griffith,* the trial court refused to instruct on last clear chance and the judgment for defendants was affirmed on appeal. The opinion contains a good summary of the basic rules applicable in a last clear chance instruction case. In discussing the requirement that evidence be "substantial", the court stated:

> "Although conflicting as well as non-conflicting evidence may be relied upon in support of a request for an instruction on a relevant legal theory, such evidence must be of that substantial character required by law to support a verdict. In *Estate of Teed,* 112 Cal. App. 2d 638, 644 (247 P. 2d 54), the court said: '. . . if the word "substantial" means anything at all, it clearly implies that such evidence must be of ponderable legal significance. Obviously the word cannot be deemed synonymous with "any" evidence. It must be reasonable in nature, credible, and of solid value; it must actually be "substantial" proof of the essentials which the law requires in a particular case.' "

The court went on to say that unless the facts can be established by some substantial evidence, the last clear chance doctrine does not apply. "Mere speculation will not suffice." *Di Sandro v. Griffith,* 188 Cal. App. 2d 428, 435, 436; 10 Cal. Rptr. 595.

Again, the court in this decision emphasized that not just "any" evidence can be considered as "sub-

stantial", but insists that the evidence must be reasonable, credible and of solid value.

In examining the record in this case, it should be kept in mind that each element of the doctrine must be supported by substantial, realistic, credible, reasonable evidence, or the instruction was erroneously given.

C. The Elements of Last Clear Chance.

This portion of the argument will discuss in turn each of the three necessary elements of the doctrine of last clear chance, and the facts of this case as they apply to the elements.

1. The First Element.

"The doctrine of last clear chance may be invoked if, and only if, the trier of the facts finds from the evidence: (1) that the plaintiff was in a position of danger and, by his own negligence, became unable to escape from such position by the use of ordinary care, either because it became physically impossible for him to escape or because he was totally unaware of the danger;"

Brandelius v. City and County of San Francisco, supra.

a. When did plaintiff reach a position of danger?

All of the eye-witnesses agree that plaintiff walked out of building "H" onto the loading dock, across the loading dock to the vicinity of the ladder, down the ladder to the ground, and thence walked over across the tracks. In determining when plaintiff first was in a position of danger it is helpful to look at other cases decided in the California Appellate courts dealing with this problem.

In one of the leading cases decided by the California Supreme Court involving the doctrine of last clear chance the plaintiff pedestrians crossed a City street in the middle of the block. They testified that they were aware of the approach of a bus and that even when they were in the center of the street they were aware of the bus' approach. The plaintiffs continued to walk forward however, and were struck by the bus. The trial court gave an instruction on the doctrine of last clear chance and then after a jury verdict for the plaintiff gave the defendant a new trial solely on the ground that it had erred in giving that instruction. The plaintiff appealed and the Supreme Court affirmed the action of the trial judge and held that the last clear chance instruction should not have been given.

With relationship to the phrase "position of danger" as the same is incorporated in the first element of the last clear chance doctrine, the Court stated as follows:

> "Plaintiffs were not in a position of danger nor in a state of helplessness within the meaning of the doctrine until they had reached a point where they could no longer escape by the exercise of ordinary care. As was said in *Dalley v. Williams, supra,* 73 Cal. App. 2d 427 at page 435, 'the term "place of safety" ordinarily includes the position of the plaintiff while he is *merely approaching* the place of danger and so long as he is *only approaching* but is not actually *in* a position of danger the plaintiff cannot invoke the doctrine . . . plaintiffs' state of helplessness was cre-

ated only by their act of leaving their position of safety near the center of the street and stepping directly into the path of danger.' "

Doran v. City and County of San Francisco, supra, at page 489.

In 1952 the California Supreme Court considered a case in which the decedent motorist approached an intersection at which a stop sign called upon him to stop his automobile, but he failed to do so and continued into the intersection to the point of impact without decreasing speed. In discussing the elements of the last clear chance doctrine the Court observed that:

"Decedent was not in a position of danger until he arrived at a point at which he could no longer stop or slow down in time to avoid a collision."

Rodabaugh v. Tekus (1952), 39 Cal. 2d 290, 294; 246 P. 2d 663.

The District Court of Appeal in 1957 considered a case involving last clear chance where the decedent motorist had stopped at a spur track, then proceeded to a point 6 to 8 feet from the first track of the main line railroad tracks, and there stopped. He then proceeded to drive onto the tracks and was struck by the train. The trial court had refused to give an instruction on last clear chance and on appeal, judgment for defendants was affirmed. The Appellate Court made the statement that when the decedent had stopped at a point approximately 6 to 8 feet from the railroad tracks that "he was then in no position of danger."

Chambers v. South Pacific Co. (1957), 148 Cal. App. 2d 873, 877; 307 P. 2d 662.

The case of *Kavner v. Holzmark* decided in 1960 involved a factual situation quite similar to this case. The plaintiff in that case was crossing a city street in the middle of the block. Defendant was driving his automobile at a speed of 25 to 30 miles per hour and testified he first saw plaintiff when plaintiff was 40 feet ahead of him, directly in front of his automobile, and that he immediately applied the brakes but nevertheless hit plaintiff. Another witness was driving a car following defendant's car and testified that he saw the plaintiff crossing the street *before* stepping into the path of defendant's car. The trial court refused to instruct the jury on last clear chance. Judgment was for defendant and plaintiff's counsel contended on appeal that defendant must have seen the plaintiff in a position of peril earlier than he testified he did because the second motorist had seen plaintiff crossing the street. In reviewing this line of argument the Appellate court stated that the mere fact that the plaintiff was crossing the street did not place him in danger "because a pedestrian can stop at any moment". The Court further concluded that when the second motorist witness saw the plaintiff "he was not in danger".

Kavner v. Holzmark (1960), 185 Cal. App. 2d 138, 144; 8 Cal. Rptr. 145.

Applying the rule of these cases to the present facts, it appears that plaintiff was not in a position of danger until he reached a position from which he could not escape the accident in the exercise of ordinary care. It is submitted that even after plaintiff descended the ladder and stood on the ground within one foot of the ladder [R. T. 268], that he was not yet

in a position of danger, since at that point he could have easily avoided the accident, in the exercise of ordinary care, simply by standing still and not walking forward across the tracks. That there was adequate room for a person to stand safely in that position appears from the testimony of Engine Foreman Baker [R. T. 755] and from an examination of the photograph, Defendant's Exhibit I. [R. T. 229.] Plaintiff's position at the foot of the ladder is analogous to the position of the pedestrians in the *Doran* and *Kavner* cases, and the motorist in the *Chambers* case.

It was prejudicial error for the trial court to instruct on the last clear chance doctrine unless there was substantial evidence to show that *after* plaintiff left his position of safety at the bottom of the steps, that the defendants had a clear chance to avoid the accident in the exercise of ordinary care.

Doran v. City and County of San Francisco, supra.

b. Was Plaintiff Negligent?

It appears obvious that when plaintiff entered a position of danger by stepping onto the tracks from his position of safety at the bottom of the ladder, that he was negligent in so doing and that this requirement of the last clear chance doctrine is clearly met.

c. Was Plaintiff Unable to Escape From the Position of Danger?

Once plaintiff left his position of safety at the bottom of the ladder and began to walk forward across the tracks, his collision with the train was inevitable. Plaintiff testified that he did not see the train moving

at any time before the impact [R. T. 269], and that just before walking forward on the tracks he looked at the train and it was still 100-150 feet away. [R. T. 264-266.] It appears from this testimony that plaintiff was totally unaware of the imminent approach of the train, whether you believe his testimony as summarized above, or the testimony of Engine Foreman Baker that the plaintiff did not even look in the direction of the train after getting to the bottom of the ladder. [R. T. 574.]

In summary it is concluded that the first element of the doctrine of last clear chance was satisfied by substantial evidence showing that as soon as plaintiff stepped forward from his position of safety at the bottom of the ladder, he entered a position of danger, that he did so through his own negligence, and that he was unaware of the approach of the train.

2. The Second Element.

The second element of the doctrine as stated by the Supreme Court of California in the *Brandelius* case is as follows:

> "The doctrine of last clear chance may be invoked if, and only if, the trier of the facts finds from the evidence . . . (2) that defendant knew that plaintiff was not in a position of danger and further knew, or in the exercise of ordinary care should have known, that plaintiff was unable to escape therefrom;"

a. Defendant's Knowledge That Plaintiff Was in a Position of Danger.

Appellant concedes that when plaintiff stepped forward from his position of safety at the bottom of

the ladder into a position of danger on the railroad tracks that it was obvious to Engine Foreman Baker that plaintiff was then in a position of danger.

b. Defendant's Knowledge That Plaintiff Could Not Escape from the Position of Danger.

There was no testimony bearing directly on the point whether plaintiff could escape from his position of danger on the tracks or not. It is certainly arguable that any experienced railroad employee would realize or should, in the exercise of ordinary care, realize that a person who walks in front of a moving railroad car which is less than 10 feet away [R. T. 755] and who is not looking in the direction of the on-coming railroad car [R. T. 574], will probably not be able to escape from his position of danger.

In summary, although there is little direct testimony bearing on this second element of the doctrine of last clear chance, Appellant concedes that there is substantial evidence to support this element, bearing in mind the conclusion that plaintiff was not in a position of danger until he stepped forward onto the tracks.

3. The Third Element.

The third element of the doctrine of last clear chance as stated by the Supreme Court of California is as follows:

> "The doctrine of last clear chance may be invoked if, and only if, the trier of the facts finds from the facts . . . (3) that thereafter defendant had the last clear chance to avoid the accident by the exercise of ordinary care but failed to exercise such last clear chance and the accident occurred as a proximate result of such failure."

As discussed above, plaintiff was not in a position of danger until he stepped forward from his place of safety at the foot of the ladder onto the tracks. Let us consider what possible actions might be taken by the defendants' employees *after this action by the plaintiff* in the exercise of ordinary care to avoid the accident.

a. Engineer Malone.

Engineer Malone testified that when he first saw the plaintiff walking on the ramp [R. T. 444-445], he had no reason to believe plaintiff would attempt to cross the tracks [R. T. 448] and he fully expected plaintiff to stop. [R. T. 526.] That he was justified in so concluding as shown by the case of *Kavner v. Holtzmark, supra,* where plaintiff pedestrian was jaywalking across the street between intersections and was hit by defendants' car. A second motorist testified he saw plaintiff walking across the street but did not see any danger that would attract attention. In commenting upon this testimony the Appellate Court stated:

> ". . . this testimony points to an applicable principle which should not be overlooked in this case. . . . "'(6) The general rule is that every person will perform his duty and obey the law, and in the absence of reasonable ground to think otherwise it is not negligence to assume that he is not exposed to danger which comes to him only from violation of law or duty by such other persons.' (citations omitted). (7) "It is axiomatic that in the absence of conduct to put him on notice to the contrary a person is entitled to assume that others will not act negligently or

unlawfully." (*Porter v. California Jockey Club, Inc.,* 134 Cal. App. 2d 158, 160 (285 P. 2d 60.) This rule is peculiarly applicable to the case of a pedestrian who approaches the path of a moving vehicle. (8) *Dalley v. Williams,* 73 Cal. App. 2d 427, 436 (166 P. 2d 595): "It has been held, in a certain class of cases, that if a defendant, while still a considerable distance away from the accident, sees the plaintiff approaching the place of danger, he has a right to assume, until the circumstances apprise him to the contrary, that the plaintiff will stop before reaching the place of danger." (Citations omitted.)

Kavner v. Holzmark, supra, etc., at page 145.

In a recent Supreme Court of California case where the plaintiff rode his motorcycle into the path of a train, the opinion refers to the duty of the railroad employees in the following language:

"When the fireman and switchman first saw plaintiff, they had no reason to believe he would be unable to stop safely or that he was inattentive and would not learn of the danger by observing the railroad crossing sign painted on the platform, the crossing sign on the shoulder of the road, and the train itself. As plaintiff continued to approach the crossing, the train crew was not required to assume that he would be unable to escape the danger until he was so close to the cars that he could not stop or turn aside. When he had reached such a position, any warning would have been futile."

Hildebrand v. L. A. Junction Railway Co. (1960), 53 Cal. 2d 826, 830; 3 Cal. Rptr. 313.

Engineer Malone further testified that he saw the plaintiff step off of the platform [R. T. 445] and that he stopped the train as soon as the plaintiff went out of sight. [R. T. 445.]

After plaintiff stepped forward from his position of safety at the foot of the ladder into a position of danger the only thing the Engineer could have done to avoid the accident would be to apply the brakes of the train. However, as shown above, he did apply the brakes of the train even before plaintiff reached his position of safety at the bottom of the ladder, to wit, at the time the plaintiff stepped down off of the platform and went out of sight. Since the application of brakes at a time before plaintiff reached his position of safety at the foot of the ladder was not timely enough to stop the train before it hit plaintiff, it should be obvious that had the Engineer applied the brakes *after* plaintiff deserted his place of safety at the foot of the ladder, that the accident could not have been avoided by the Engineer, in the exercise of due care.

b. Engine Foreman Baker.

The only way in which Engine Foreman Baker could have acted to avoid the accident, would have been to issue warnings to the plaintiff not to proceed on to the tracks, or to warn the Engineer to stop the train. Baker testified that the train was 10 to 12 feet south of the ladder area at the time plaintiff appeared at the ladder and began to descend it. [R. T. 755.] According to plaintiff's testimony, he had a conversation with Baker while standing at the top of the ladder. Had Baker at that time ordered plaintiff to remain in that position, it is possible that the accident

might have been avoided, but Baker's failure to do so, even if considered to have been negligent, cannot apply to the doctrine of last clear chance since plaintiff was at that time in a position of safety, as discussed above.

Baker testified that while plaintiff was on the ladder and arriving at the ground, he began to yell "No, No, No" at the plaintiff [R. T. 753], and this testimony was corroborated by Shirley Lawton [R. T. 399], although plaintiff testified it sounded like "Go, Go, Go" to him. [R. T. 263.] This warning, sounded by Baker before plaintiff even left his place of safety on the ground at the foot of the ladder, did not deter plaintiff from proceeding into the path of the train. So it appears that had this warning been deferred until after plaintiff left his position of safety at the foot of the ladder and proceeded to a position of danger on the tracks, that a similar warning at that time would not have afforded the defendant a clear chance to avoid the accident in the exercise of ordinary care.

In so far as Baker had an opportunity to stop the train by giving a stop sign to the Engineer, his testimony is that he gave such a stop sign while plaintiff was descending the ladder and arriving at the ground at the foot of the ladder. [R. T. 756.] Engineer Malone testified that he saw Baker giving a violent stop signal just at the time the plaintiff started to step off the platform. [R. T. 444-446.] And Switchman Trembley said he saw Baker giving a violent stop signal at the time the plaintiff stepped off the platform. [R. T. 685.]

Engineer Malone further testified that he applied the brakes in response to his own observation of the plain-

tiff's conduct at the same time that Baker was giving the stop signal. [R. T. 445.] Since the stop sign given by Baker as the plaintiff was descending from the platform was not timely enough to avoid the accident, it would seem beyond argument that a stop signal given by Baker *after* the plaintiff stepped forward from his position of safety at the foot of the ladder to a position of danger on the tracks would not have afforded defendant a clear chance to avoid the accident in the exercise of ordinary care.

c. Other Railroad Employees.

Switchman Trembley was standing on the ground between the track and the dock [R. T. 681] at a point about 300 feet from the electric door [R. T. 680] at the time of the accident. He saw the plaintiff step off the dock in front of the train at a time when he estimated the front end of the train was 10 to 15 feet from the ladder [R. T. 683-695] although he admitted on cross-examination the distance could have been as much as 20 feet. [R. T. 699.] The observations and actions of Trembley did not give the defendant any opportunity to avoid the accident after the moment that the engine passed by his position on the ground, since the Engineer, who was the only person who could have applied the brakes and stopped the engine and cars, could not see him after the engine passed him by. [R. T. 703-704.]

Fireman Gene Fischer was seated on the left side of the engine cab [R. T. 718] and did not see the injured man at any time before the accident. [R. T. 720.]

Switchman Harold Williams was standing somewhere between the gate and the end of the dock [R. T.

623], was not looking at the train at the instant of the accident [R. T. 623] and did not see the plaintiff at any time before the accident happened.

Thus, it can be seen that if defendant did in fact have *any* last clear chance to avoid the accident after plaintiff was in a position of danger on the tracks, it could only have been through the actions and efforts of Engine Foreman Baker or Engineer Malone as discussed above.

It is concluded that there is a lack of substantial evidence to support the third necessary element of the doctrine of last clear chance, and therefore, it was prejudicial error for the trial court to give that instruction to the jury.

d. The Essential Time Interval Was Not Present in This Case.

The Supreme Court of California in the leading case on last clear chance, in 1957, restated the formula for the application of last clear chance, and stated that the main purpose in restating the formula "has been to state more clearly the vital time element involved in the application of the doctrine," and noted that "the time element is the all important factor."

The court further stated that:

> "The time for the exercise by defendant of any last clear chance as defined in the formula commences only at such time as defendant has both (1) actual knowledge of the injured person's 'position of danger' and (2) actual or constructive knowledge that the injured person 'cannot escape from such situation.' "
>
> *Brandelius v. City and County of San Francisco, supra.*

1. Last Clear Chance Does Not Mean a "Splitting of Seconds".

A case decided by the District Court of Appeal in 1928 has been widely followed and quoted in subsequent decisions by California Appellate courts. In that case the defendant's train was proceeding at 45 miles per hour when a truck drove onto the crossing when the train was approximately 150 feet distant. The train brakes took hold approximately 75 feet before the impact. The trial court granted the defendant's motion for a nonsuit and on appeal plaintiff argued that the doctrine of last clear chance should apply. The Appellate court, in reviewing the evidence, concluded that the motorman had made the brake application "within practically one second of time." The court then discussed the time element of the doctrine of last clear chance in the following language:

> "Certainly the doctrine of last clear chance never meant a splitting of seconds when emergencies arise. There seems still to be some misconception of this doctrine of last clear chance. It was not devised as a last resort to fasten liability on defendants. Like the body of the law of negligence, to which the doctrine is appended, the test remains as that of ordinary care under all of the circumstances. The law in many of its workings indicates great charity and solicitude for individual rights. It says to a negligent plaintiff that in spite of his lack of caution he will be protected against wanton, wilful or avoidable harm. But, on the other hand, it penalizes no innocent person. We are not to tear down the facts of a case and rebuild the same so that, by a trimming down

and tight-fitting operation, something can be constructed upon which may be fastened the claim of last clear chance. The words mean exactly as they indicate, namely, last *clear* chance, not possible chance."

Bagwill v. Pacific Electric Ry. Co., 90 Cal. App. 114, 121; 265 Pac. 517.

The language just quoted from the Bagwill opinion was cited with approval by the Supreme Court of California in a 1952 decision. In that case the defendant motorist saw decedent's automobile approaching at right angles to the intersection, but assumed that decedent would stop for a stop sign. When decedent was within 75 to 100 feet and had not slowed down, defendant started to apply his brakes gently, still thinking the decedent would stop. The defendant applied his brakes in full at a distance of 35 feet. The decedent never did slow his speed before the impact. The trial court instructed the jury as to last clear chance and a jury verdict was returned for the plaintiff. The trial court then granted the defendant's motion for judgment notwithstanding the verdict. The Supreme Court affirmed the action of the trial judge. The plaintiff argued on appeal by a series of mathematical calculations. The court concluded that the record was devoid of substantial evidence to sustain the application of the last clear chance doctrine and that it was error for the trial court to instruct the jury with respect thereto.

Rodabaugh v. Tekus, supra.

The analogy between the fact situation in the *Doran* case and the actions of plaintiff in this case is clear. Plaintiff Munoz was in a position of safety at the foot of the ladder and took only two or three steps forward before being hit by the train. The rule of the *Doran* case quoted above has been referred to and followed many times and was cited and approved by the Supreme Court of California in a very recent case.

Shahinian v. McCormick (May 1963), 59 A. C. 575, 589.

The Supreme Court had previously stated in the *Rodabaugh* case that:

> "The doctrine of last clear chance should not be applied to the ordinary case in which the act creating the peril occurs practically simultaneously with the happening of the accident and in which neither party can fairly be said to have had a last clear chance thereafter to avoid the consequences. To apply the doctrine to such cases would be equivalent to denying the existence of the general rule which makes contributory negligence a bar to recovery."

Rodabaugh v. Lekus, supra (1952), 39 Cal. 2d 290, 295; 246 P. 2d 663.

The rule thus enunciated in the *Rodabaugh, Doran* and *Shahinian* cases by the Supreme Court of California has been followed and quoted in several District Court of Appeal decisions.

Clairda v. Aguirre (1957), 156 Cal. App. 2d 112, 116; 319 P. 2d 20;

Welsh v. Gardner (1960), 187 Cal. App. 2d 104, 110.

In a 1962 case involving an automobile—train collision at a railroad crossing the Court stated as follows:

> "The doctrine pre-supposes time for effective action (citation omitted); and does not contemplate split second decisions. (Citations omitted) The doctrine of last clear chance does not apply when the emergency arises suddenly and there are only a few seconds to avoid a collision and where there is no substantial evidence that the defendant had the time to avoid the collision.
>
> *Miller v. Western Pacific R.R. Co.* (1952), 207 Cal. App. 2d 581, 605; 24 Cal. Rptr. 785.

3. Last Clear Chance Does Not Apply Unless the Chance the Defendant Has to Avoid the Accident is Both the "Last" Chance and Is a "Clear" Chance.

Some of the cases have discussed the time interval requirement in language that at first glance seems to be a parody of the doctrine itself. This language was first employed in the *Doran* case as follows:

> "The underlying basis for the application of this doctrine, which permits an injured person to recover despite his continuing and contributory negligence, is that defendant was afforded a *last* chance and a *clear* chance to avoid the accident *after* defendant had discovered that plaintiff was in a helpless situation. It is based upon the hu-

manitarian concept that the fault of the injured party should not relieve the erring defendant of his liability if defendant is afforded such last clear chance to avoid the accident after actually discovering that it is too late for the injured party to avail himself of any similar chance. (11) But the chance which is afforded to defendant must be something more than a bare possible chance. It must be not only a *last* chance but a *clear* chance, following actual knowledge of plaintiff's helplessness, to avoid the accident by the exercise of ordinary care; and, by its very terms, the doctrine excludes from its application any case in which plaintiff's state of helplessness, resulting from his own negligence, is created so nearly simultaneously with the happening of the accident that neither party may be fairly said to have thereafter a last clear chance to avoid the accident."

Doran v. City and County of San Francisco, supra, at pages 487-488.

The tendency of the California Appellate Courts to discuss and enforce this requirement has become pronounced enough that a 1960 District Court of Appeal decision remarked upon it in the following language:

"The recent California cases reflects this emphasis upon the requirement that the opportunity to avoid the accident must be actual and 'clear' ".

Bell v. Huson (1960), 180 Cal. App. 2d 820, 827; 4 Cal. Rptr. 716.

A very recent case stated "the doctrine applies only to those instances where the chance offered the defendant to avoid the accident by the exercise of ordinary care is a *clear* chance."

> *Garcia v. Hoffman* (Jan. 30, 1963), 212 A. C. A. 540, 551.

4. The Time Interval Available to the Defendant to Exercise The Last Clear Chance Must Be a Substantial Period of Time.

In a 1960 case involving a collision between an automobile and a jay-walking pedestrian, the Appellate Court affirmed judgment for defendant after the trial judge had refused to instruct on last clear chance. In discussing the doctrine of last clear chance the decision states:

> "A substantial period of time must elapse after defendant has gained knowledge that plaintiff is in danger before defendant can be said to have had the last clear chance."
>
> *Kavner v. Holtzmark, supra* (1960), 185 Cal. App. 2d 138, 144; 8 Cal. Rptr. 145.

We conclude from an examination of the cases cited above that the time in which the defendant may be considered to have a last clear chance to avoid the accident does not commence until the defendant has actual knowledge of the plaintiff's predicament, and actual or constructive knowledge of the plaintiff's ability to escape it. When these conditions are met, the de-

fendant thereafter must have a *substantial period of time* in which to act to avoid the accident in the exercise of ordinary care. A period of time which requires the "splitting of seconds", which consists of only a few seconds, which relates to practically simultaneous occurrences, or which does not afford the defendant a *clear* chance is not sufficient to bring the doctrine into play. Applying these various descriptions of the time interval test to the facts of this case, defendant submits that it did not have *any* chance to avoid the accident after plaintiff stepped forward from his position of safety at the bottom of the ladder into a position of danger, much less a *last* and *clear* chance.

In fact defendant was in a position similar to that of the defendant in the *Hickambottom* case where the defendant immediately applied his brakes upon seeing the decedent's vehicle but the collision occurred none the less. The Appellate Court held the last clear chance doctrine to be inapplicable and commented as follows:

> "In view of the fact that defendant did realize his danger and made a determined effort to stop, it would be wholly held logical and unreasonable for the jury to have found upon the circumstantial evidence that there was a considerable interval of time during which defendant realized the danger and made no effort to avoid the accident."
>
> *Hickambottom v. Cooper, supra* (1958), 163 Cal. App. 2d 489, 494 and 495; 329 P. 2d 609.

VI.
CONCLUSION.

In view of the authorities, facts and argument set forth above, Appellant submits that it was prejudicial error for the trial judge to instruct the jury in this case on the last clear chance doctrine. That the giving of the instruction materially effected the outcome of the case is clear in view of the fact that on March 21, 1963, at 2 P.M., the jury requested that the instruction be re-read [R. T. 1032], and the instruction was in fact re-read to the jury twice. [R. T. 1035-1039.]

Accordingly, Appellant submits that the trial judge should have granted its motion for judgment after trial, or in the alternative, a new trial, and respectfully requests this Court to order a new trial in the case.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

M. W. Vorkink,